

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

ARNETTE E. AULIS.

Plaintiff,

VS.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

Case No. 12cv560-JPH

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

BEFORE THE COURT are cross-motions for summary judgment. ECF

Nos. 15, 17. Attorney Rebecca Coufal represents plaintiff (Aulis). Special Assistant

United States Attorney Gerald J. Hill represents defendant (Commissioner). The

parties consented to proceed before a magistrate judge, ECF No. 6. After reviewing

the administrative record and the briefs filed by the parties, the court grants

ORDER GRANTING DEFENDANT'S MOTION

FOR SUMMARY JUDGMENT ~ 1

1 defendant's motion for summary judgment, ECF No. 17.

JURISDICTION

Aulis protectively applied for disability insurance benefits (DIB) and supplemental security income (SSI) benefits in November 2009 alleging disability beginning June 30, 2009 (Tr. 156-62, 163-68). The claims were denied initially and on reconsideration (Tr. 85-88, 91-95). Administrative Law Judge (ALJ) Gene Duncan held a hearing February 18, 2011. Psychologist Kent Layton, Psy.D., a vocational expert and Aulis testified (Tr. 37-80). On July 12, 2001, the ALJ issued an unfavorable decision (Tr. 11-23). The Appeals Council denied review on September 21, 2012 (Tr. 1-5). On October 9, 2012, Aulis appealed pursuant to 42 U.S.C. §§ 405(g). ECF No. 1, 5.

STATEMENT OF FACTS

13 The facts have been presented in the administrative hearing transcript, the
14 decisions below and the parties' briefs. They are only briefly summarized here and
15 throughout this order as necessary to explain the Court's decision.

16 Aulis was 48 years old when she applied for benefits. She earned a GED and
17 completed some college courses (Tr. 40, 70-71, 81). She last used methamphetamine
18 and alcohol in May 2010 (Tr. 42). She was imprisoned in 2005 -06 and May 2010 to
19 February 2011 (Tr. 539) but testified it was from June 2009 until February 1, 2010
20 (Tr. 54). She testified "I have bible studies." She rides the bus (Tr. 43, 65). At the

ORDER GRANTING DEFENDANT'S MOTION

FOR SUMMARY JUDGMENT ~ 2

1 time of the hearing Aulis was working eight to sixteen hours a week at a temporary
2 job (Tr. 39, 62-64). She can no longer work as a bartender because she “can’t hold
3 the bottles like [she] used to” and is unable to sit or stand for long periods due to
4 back pain (Tr. 43, 61). Hepatitis causes memory and other cognitive problems,
5 depression, itching, fatigue, migraines and nausea (Tr. 39-40, 43, 52-54, 58-60, 67,
6 69).

7 **SEQUENTIAL EVALUATION PROCESS**

8 The Social Security Act (the Act) defines disability as the “inability to engage
9 in any substantial gainful activity by reason of any medically determinable physical
10 or mental impairment which can be expected to result in death or which has lasted or
11 can be expected to last for a continuous period of not less than twelve months.” 42
12 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a plaintiff shall
13 be determined to be under a disability only if any impairments are of such severity
14 that a plaintiff is not only unable to do previous work but cannot, considering
15 plaintiff’s age, education and work experiences, engage in any other substantial
16 work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A),
17 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and
18 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

19 The Commissioner has established a five-step sequential evaluation process
20 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step

1 one determines if the person is engaged in substantial gainful activities. If so,
2 benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the
3 decision maker proceeds to step two, which determines whether plaintiff has a
4 medically severe impairment or combination of impairments. 20 C.F.R. §§
5 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

6 If plaintiff does not have a severe impairment or combination of impairments,
7 the disability claim is denied. If the impairment is severe, the evaluation proceeds to
8 the third step, which compares plaintiff's impairment with a number of listed
9 impairments acknowledged by the Commissioner to be so severe as to preclude
10 substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20
11 C.F.R. § 404 Subpt. P App. 1. If the impairment meets or equals one of the listed
12 impairments, plaintiff is conclusively presumed to be disabled. If the impairment is
13 not one conclusively presumed to be disabling, the evaluation proceeds to the fourth
14 step, which determines whether the impairment prevents plaintiff from performing
15 work which was performed in the past. If a plaintiff is able to perform previous work
16 that plaintiff is deemed not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv),
17 416.920(a)(4)(iv). At this step, plaintiff's residual functional capacity (RFC) is
18 considered. If plaintiff cannot perform past relevant work, the fifth and final step in
19 the process determines whether plaintiff is able to perform other work in the national
20 economy in view of plaintiff's residual functional capacity, age, education and past

ORDER GRANTING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT ~ 4

1 work experience. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v.*
2 *Yuckert*, 482 U.S. 137 (1987).

3 The initial burden of proof rests upon plaintiff to establish a *prima facie* case
4 of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir.
5 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
6 met once plaintiff establishes that a mental or physical impairment prevents the
7 performance of previous work. The burden then shifts, at step five, to the
8 Commissioner to show that (1) plaintiff can perform other substantial gainful
9 activity and (2) a “significant number of jobs exist in the national economy” which
10 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

11 **STANDARD OF REVIEW**

12 Congress has provided a limited scope of judicial review of a Commissioner’s
13 decision. 42 U.S.C. § 405(g). A Court must uphold a Commissioner’s decision,
14 made through an ALJ, when the determination is not based on legal error and is
15 supported by substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir.
16 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). “The [Commissioner’s]
17 determination that a plaintiff is not disabled will be upheld if the findings of fact are
18 supported by substantial evidence.” *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir.
19 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla,
20 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n 10 (9th Cir. 1975), but less than a

ORDER GRANTING DEFENDANT’S MOTION

FOR SUMMARY JUDGMENT ~ 5

1 preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-02 (9th Cir. 1989).
2 Substantial evidence “means such evidence as a reasonable mind might accept as
3 adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401
4 (1971)(citations omitted). “[S]uch inferences and conclusions as the [Commissioner]
5 may reasonably draw from the evidence” will also be upheld. *Mark v. Celebreeze*,
6 348 F.2d 289, 293 (9th Cir. 1965). On review, the Court considers the record as a
7 whole, not just the evidence supporting the decision of the Commissioner. *Weetman*
8 *v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989)(quoting *Kornock v. Harris*, 648 F.2d 525,
9 526 (9th Cir. 1980)).

10 It is the role of the trier of fact, not this Court, to resolve conflicts in evidence.
11 *Richardson*, 402 U.S. at 400. If evidence supports more than one rational
12 interpretation, the Court may not substitute its judgment for that of the
13 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th
14 Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be
15 set aside if the proper legal standards were not applied in weighing the evidence and
16 making the decision. *Brawner v. Secretary of Health and Human Services*, 839 F.2d
17 432, 433 (9th Cir. 1987). Thus, if there is substantial evidence to support the
18 administrative findings, or if there is conflicting evidence that will support a finding
19 of either disability or nondisability, the finding of the Commissioner is conclusive.
20 *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9th Cir. 1987).

1 Plaintiff has the burden of showing that drug and alcohol addiction (DAA) is
2 not a contributing factor material to disability. *Ball v. Massanari*, 254 F.3d 817, 823
3 (9th Cir. 2001). The Social Security Act bars payment of benefits when drug
4 addiction and/or alcoholism is a contributing factor material to a disability claim. 42
5 U.S.C. §§ 423(d)(2)(C) and 1382(a)(3)(J); *Bustamante v. Massanari*, 262 F.3d 949
6 (9th Cir. 2001); *Sousa v. Callahan*, 143 F.3d 1240, 1245 (9th Cir. 1998). If there is
7 evidence of DAA and the individual succeeds in proving disability, the
8 Commissioner must determine whether DAA is material to the determination of
9 disability. 20 C.F.R. §§ 404.1535 and 416.935. If an ALJ finds that the claimant is
10 not disabled, then the claimant is not entitled to benefits and there is no need to
11 proceed the analysis to determine whether substance abuse is a contributing factor
12 material to disability. However, if the ALJ finds that the claimant is disabled, then
13 the ALJ must proceed to determine if the claimant would be disabled if he or she
14 stopped using alcohol or drugs.

15 **ALJ'S FINDINGS**

16 The ALJ found Aulis was insured through December 31, 2014 (Tr. 11, 13) At
17 step one, he found Aulis did not work at substantial gainful activity levels after onset
18 (Tr. 13). At steps two and three, he found she suffers from degenerative disc disease,
19 bilateral wrist pain, thumbs with carpal tunnel release, obesity, depression, anxiety, a
20 personality disorder and substance abuse, impairments that are severe but do not

1 meet or medically equal a Listed impairment (Tr. 14). The ALJ found Aulis less
2 than credible and assessed an RFC for a range of light work (Tr. 16). At step four, he
3 relied on the VE's testimony and found Aulis is able to perform her past relevant
4 work as a cashier or garment sorter (Tr. 22, 74-75), meaning she is not disabled as
5 defined by the Act.

6 ISSUES

7 Aulis alleges the ALJ erred at step two, failed to develop the record and erred
8 when he assessed her RFC. ECF No. 8-13. She alleges additional evidence
9 considered by the Appeals Council should result in a finding of disability or remand
10 for further administrative proceedings. ECF No. 15 at 13-16. The Commissioner
11 responds that the new evidence does not support finding Aulis disabled or require
12 remand, and the ALJ's findings are factually supported and free of harmful legal
13 error. She asks the court to affirm. ECF No. 17 at 2, 17.

14 DISCUSSION

15 *A. Credibility*

16 Aulis does not address the ALJ's credibility assessment, making it a verity on
17 appeal. She challenges the ALJ's assessment of conflicting medical evidence. The
18 court addresses credibility because the ALJ considered it when he weighed the
19 medical evidence.

20 When presented with conflicting medical opinions, the ALJ must determine

1 credibility and resolve the conflict. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d
2 1190, 1195 (9th Cir. 2004)(citation omitted). The ALJ's credibility findings must be
3 supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th
4 Cir. 1990). Absent affirmative evidence of malingering, the ALJ's reasons for
5 rejecting the claimant's testimony must be "clear and convincing." *Lester v. Chater*,
6 81 F.3d 821, 834 (9th Cir. 1995).

7 The ALJ's reasons are clear and convincing.

8 The ALJ relied on Aulis's unexplained lack of treatment for hepatitis and
9 arthritis, failure to take medication prescribed for arthritis, and refusal to undergo
10 spinal imaging (Tr. 18, 241, 243-44, 339, 373-76, 378-79, 381-82, 389, 510, 528-29,
11 539). He relied on Aulis' ability to work steadily for 20 years after she was
12 diagnosed with hepatitis (Tr. 21, 203, 510). Other activities during the relevant
13 period include refinishing furniture, driving, shopping, crocheting, crafting items
14 such as hats, reading, laundry, vacuuming, dusting, cooking, attending church and
15 playing computer games (Tr. 18, 266, 268, 297, 300, 389, 480, 542). The ALJ relied
16 on numerous inconsistent statements, including with respect to substance use (Tr.
17 17, 37-44, 53-69, 185-92, 297, 300, 381, 417, 481, 510, 520, 538-39) and on claims
18 such as that she has asthma and diabetes but for which there is no diagnosis in the
19 record (Tr. 21, 243, 317-18, 415, 436, 459, 482). Treating sources have opined Aulis
20 is able to work (Tr. 268). Effort during testing has been questionable (Tr. 298, 544).

ORDER GRANTING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT ~ 9

1 The ALJ's reasons are clear, convincing and supported by substantial
2 evidence. Although lack of medical evidence cannot form the sole basis for
3 discounting pain testimony, it is a factor the ALJ can consider when analyzing
4 credibility. *Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005). The ALJ is
5 permitted to consider inconsistent statements and activities inconsistent with
6 allegedly severe limitations. *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th Cir.
7 2002). Failing to give maximum or consistent effort during medical evaluations is
8 "compelling" evidence that the claimant is not credible. *Thomas*, 278 F.3d at 959.
9 An unexplained or inadequately explained failure to follow prescribed medical
10 treatment is properly considered. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).

11 ***B. Step two***

12 Aulis alleges the ALJ should have found hepatitis C with fatigue, migraines
13 and arthritis are severe impairments. ECF No. 15 at 9, 18-22. The Commissioner
14 answers that (1) Aulis has not identified any objective medical evidence that shows
15 hepatitis and migraines are severe impairments; (2) the ALJ fully considered arthritis
16 at step two and (3) any step two error is harmless. ECF No. 17 at 5-10.

17 Any error at step two was harmless because the ALJ resolved that step in
18 Aulis' favor. *See Stout v. Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1056 (9th Cir.
19 2006)(citing *Burch v. Barnhart*, 400 F.3d 676, 682 (9th Cir. 2005)). The
20 Commissioner is also correct that Aulis points to nothing in the record supporting

1 allegations that hepatitis and migraine significantly limit the ability to do basic work
2 activities. The ALJ notes Aulis worked for many years after being diagnosed with
3 hepatitis, did not even seek treatment until 2010 and nothing in the record indicates
4 she was undergoing extensive treatment for it (Tr. 21, 510).

5 With respect to arthritis, the ALJ similarly notes Aulis' failure to seek
6 treatment and, later, to comply with recommended treatment, both cast doubt on
7 the allegation that arthritis is a severe impairment. Moreover, the RFC included
8 limitations caused by obesity and arthritis, even though the ALJ did not list arthritis
9 as a severe impairment at step two (Tr. 14, 16, 18, 241, 243-44, 373-76, 379, 381-
10 82, 389, 528-29).

11 When he weighed the evidence the ALJ also considered the opinion of Alysa
12 Ruddell, Ph.D. On May 3, 2011, she performed a consultative evaluation after the
13 hearing at the ALJ's request (Tr. 535, 537-550). Dr. Ruddell notes Aulis' level of
14 effort compromised the validity of the evaluation (Tr. 19-20, 544, 546, 548). Aulis
15 told Dr. Ruddell she was never able to keep a job long (Tr. 537). Elsewhere she
16 indicated her last job was as a cashier. The job ended in June 2009 and she did it for
17 a year (Tr. 300). ALJ Duncan considered the opinion of a treating physician's
18 assistant that Aulis is able to work (Tr. 20, 266, 268). And he considered Aulis'
19 credibility and the record as a whole.

20 The ALJ did not err when weighing Aulis' limitations.

1 *C. Duty to develop the record*

2 Aulis alleges the ALJ failed to develop the record because he did not have a
3 medical expert testify at the hearing, although a psychologist testified. ECF No. 15
4 at 11-14. The Commissioner responds that the record is unambiguous and adequate
5 for evaluation; accordingly, the ALJ had no duty to further develop the record. ECF
6 No. 17 at 11-13. The Commissioner is correct.

7 The ALJ's duty to further develop the record is triggered when the evidence is
8 ambiguous or the record is inadequate to make a disability determination.
9 *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001). Neither applies in this
10 case.

11 *D. RFC*

12 Aulis alleges the residual functional capacity assessment and vocational
13 hypothetical should have included fatigue and other limitations from hepatitis. ECF
14 No. 15 at 12-13. The Commissioner responds that this is simply a recasting of Aulis'
15 step two argument. ECF No. 17 at 14.

16 The Commissioner is correct. The ALJ assessed an RFC that adequately
17 captures the limitations supported by the record. *See Stubbs-Danielson v. Astrue*,
18 539 F.3d 1169, 1174 (9th Cir. 2008) (an ALJ's assessment of a claimant adequately
19 captures restrictions related to concentration, persistence or pace where the
20 assessment is consistent with restrictions identified in the medical testimony).

ORDER GRANTING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT ~ 12

1 *E. Appeals Council evidence*

2 The court has considered the evidence presented for the first time to the
 3 Appeals Council (Tr. 552-72) to determine whether the ALJ's decision is supported
 4 by substantial evidence. *See Brewes v. Comm'r of Soc. Sec. Admin.*, 659 F.3d 1157,
 5 1159-60, 1162-63 (9th Cir. 2011). The new evidence does not change the fact that the
 6 ALJ's decision is supported by substantial evidence.

7 Aulis' remaining allegations lack specificity in the briefing, lack analysis and
 8 are deemed forfeited as too undeveloped to be capable of assessment. *See*
 9 *Carmickle v. Commissioner, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 (9th Cir. 2008);
 10 *Rattlesnake Coalition v. United States EPA*, 509 F.3d 1095 (9th Cir. 2007);
 11 *Greenwood v. Fed. Aviation Admin.*, 28 F.3d 971, 977 (9th Cir. 1994); *Independent*
 12 *Towers of Wash. v. Wash.*, 350 F.3d 925, 929 (9th Cir. 2003).

13 The ALJ properly weighed the contradictory evidence. The record fully
 14 supports the assessed RFC. Although Aulis alleges the ALJ should have weighed the
 15 evidence differently, the ALJ is responsible for reviewing the evidence and resolving
 16 conflicts and ambiguities. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1041-42 (9th
 17 Cir. 2008)(internal citations omitted). The court will uphold the ALJ's conclusion
 18 when the evidence is susceptible to more than one rational interpretation. *Burch v.*
 19 *Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005).

20 The ALJ's determinations are supported by the record and free of harmful

1 legal error.

2 **CONCLUSION**

3 After review the Court finds the ALJ's decision is supported by substantial
4 evidence and free of harmful legal error.

5 **IT IS ORDERED:**

6 Defendant's motion for summary judgment, **ECF No. 17**, is **granted**.

7 Plaintiff's motion for summary judgment, ECF No. 15, is denied.

8 The District Court Executive is directed to file this Order, provide copies to
9 counsel, enter judgment in favor of defendant and **CLOSE** the file.

10 DATED this 27th day of December, 2013.

11 S/ James P. Hutton

12 JAMES P. HUTTON
13 UNITED STATES MAGISTRATE JUDGE